No. 13924

United States Circuit Court of Appeals

For the Ninth Circuit

A. C. ROLK,

Appellant,

vs.

J. NEILS LUMBER COMPANY, a corporation, and THE UNITED STATES OF AMERICA,

Appellees.

BRIEF OF APPELLEE J. NEILS LUMBER COMPANY

Upon Appeal from the District Court of the United States for the District of Montana

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STATEMENT OF THE CASE

Appellee J. Neils Lumber Company accepts appellant's Statement of the Case and of the questions to be heard and decided by this Court. Appellee does not agree, however, with appellant's statement (Appellant's Brief p. 8) that the activities upon which the suit is based were compensable work under the rule

of the *Mt. Clemens, Tennessee* and *Jewell Ridge* cases.* Appellee's answer alleged, and its evidence would undertake to establish, that the activities were not compensable work under the statute as interpreted in the three cases referred to.

ARGUMENT

The single question presented by this appeal is whether Section 2 of the Portal-to-Portal Act of 1947, 29 U.S.C.A. 251 et seq., is constitutional. Appellant challenges the constitutionality of this statute, as applied to the rights of action pleaded, because these rights of action are, as appellant contends, vested rights which appellant asserts are beyond the power of Congress to destroy.

Appellee J. Neils Lumber Company challenges both the premise and the conclusion of this argument. The rights of action pleaded were created by statute and were subject to change or repeal by statute; and if upon any theory they could be classified as vested rights, Congress had power to impair or destroy them because they conflicted with a national policy deemed necessary in the public interest.

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*Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680;
Tennessee Coal, Iron & R. R. Co. v. Muscoda, 321 U.S. 590;
Jewell Ridge Coal Corp. v. U. M. W., 325 U.S. 161.

Up to the time of the preparation of this brief three Circuit Courts of Appeal and many District Courts have sustained the constitutionality of Section 2 of the Portal-to-Portal Act for either or both of the reasons just stated.* We shall cite and quote from several of these decisions in the argument to follow.

I.

The rights upon which the action is based were of statutory creation and were not vested or property rights.

The demand of the complaint is for wages, with overtime and penalties, for activities which appellant claims constituted work under the provisions of the Fair Labor Standards Act. 29 U.S.C.A. Section 201-219. The pleadings, supplemented by the stipulation

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*Seese v. Bethlehem Steel Co., 168 F. (2d) 58;
Battaglia v. General Motors Corp., 8 W. H. Cases p. 108 (decided July 3, 1948);
Fisch v. General Motors Corp., 15 Labor Cases, 74, 129 (decided August 2, 1948);
Miller et al. v. Howe Sound Mining Corp., 77 F. Supp. 540;
Sadler v. W. S. Dickey Clay Mfg. Co., 73 F. Supp. 690;
Ackerman v. J. I. Case Co., 74 F. Supp. 639, 644;
Burfeind v. Eagle-Picher Co. of Texas, 71 F. Supp. 929;
Cochran v. St. Paul & Tacoma Lumber Co., 73 F. Supp. 288;
Lasater v. Hercules Powder Co., 73 F. Supp. 264;
Reid v. Day & Zimmerman, Inc., 73 F. Supp. 892;
Hornbeck v. Dain Mfg. Co., 7 W. H. Cases p. 296;
Hart v. Aluminum Company of America, 73 F. Supp. 727.

recited in the order of the Court below (R. 31), establish that these activities were not compensable work under the provisions of the contract of employment. If they are in fact compensable, they became so only because of the enactment of the statute which enlarged the contractual obligation voluntarily assumed by the employer. They are contract rights only in the sense that they accrue to individuals who have entered into employment contracts subject to the statute. The statute and not the employment contract is the foundation of the right.

The Circuit Courts of Appeal and the District Courts which have thus far passed upon this question have almost uniformly held that wage and overtime rights which were enforcible only because of the provisions of the Fair Labor Standards Act were not vested or property rights. The most recent decision is that of the Circuit Court of Appeals for the Sixth Circuit in *Fisch v. General Motors Corp.* (decided August 2, 1948), 15 Labor Cases, 74,129. The Court there said:

> "Plaintiffs contend that their causes of action are founded upon rights vested in them and protected by the due process clause of the Fifth Amendment, which cannot be disturbed. We think plaintiffs'

rights were not 'vested rights' in the sense contended.

* * *

"The plaintiffs' causes of action are not founded altogether simply upon contract executed by the free consent and agreement of the parties thereto. The contracts were based upon subject matter in respect to which Congress had authority to legislate; and did not establish fixed rights of either present or future enjoyment. They were regulated by the Fair Labor Standards Act as construed in *Tenn. Coal Co. v. Muscoda Local*, 321 U.S. 590 (8 Labor Cases 51, 175); *Jewell Ridge Corp. v. Local*, 325 U.S. 161 (9 Labor Cases 51, 201), and especially by the *Mount Clemens* decision. Plaintiffs could not expect that their status or rights would remain unchanged through changing circumstances and conditions. They could reasonably anticipate changes in the law. The proposition that their rights granted by the Congress under the commerce clause could not be taken away by congressional legislation under the same clause, is self-contradictory."

In *Seese v. Bethlehem Steel Co.*, 168 F. (2d) 58, the Circuit Court of Appeals for the Fourth Circuit stated as its first reason for sustaining the constitutionality of the Portal-to-Portal Act that "even rights arising out of contract cannot fetter Congress in the exercise of a power granted it by the Constitution;"

but, the Court added "the rights stricken down by the statute are not rights arising out of the contract at all, but rights created by statute as an incident of the statutory regulation of commerce." 168 F. (2d) 62.

In *Sadler v. W. S. Dickey Clay Mfg. Co.*, 73 F. Supp. 690, the District Court for the Western District of Missouri stated its reasons for this conclusion as follows:

> "The rights here asserted by plaintiffs are not vested property rights. They are rights accruing by virtue of a statute enacted by Congress. True, the federal statute which permits such recovery 'is bottomed upon a contract of employment,' (Republic Pictures Corp. v. Kappler (8th Cir.) 151 F. 2d 543, 546 (5 WH Cases 680)), but, regardless of the provisions of such employment contract, the right of recovery here asserted by plaintiffs is traceable to the provisions of the Fair Labor Standards Act of 1938, and not to any contract provision plaintiffs have with defendant. Under such circumstances, the cause of action here asserted for overtime compensation is a statutory cause of action. The plaintiffs have no property right to the benefits of the Fair Labor Standards Act of 1938, 'except under and by virtue of the statutes securing it to (them), and according to the regulations and restrictions of those statutes.' Dablo Grain Shovel Co. v. Fling, 137 U.S. 41, 43."

In *Seese et al. v. Bethlehem Steel Co.*, 74 F. Supp. 412, 419, the District Court for the District of Maryland, in passing upon this question, said:

> "If it had thought wise to do so, Congress could have repealed the Fair Labor Standards Act in toto and if the repealing Act provided that it should apply to all existing claims or cases under the Act repealed and did not contain a saving clause with respect to them, it is not apparent why it would have been invalid as to them."
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> * * *
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> "I therefore conclude that the rights now asserted by the plaintiffs under the Fair Labor Standards Act were not vested rights protected by the 5th Amendment because only of statutory origin which could be and have been constitutionally taken away by the Portal-to-Portal Act."

Other District Court decisions holding that wage and overtime rights enforcible because of the provisions of the Fair Labor Standards Act are statutory rights and not vested rights within the protection of the Fifth Amendment are:

Ackerman v. J. I. Case Co., 74 F. Supp. 639;

Burfeind v. Eagle-Picher Co. of Texas, 71 F. Supp. 929;

Cochran v. St. Paul & Tacoma Lumber Co., 73 F. Supp. 288;

Darr v. Mutual Life Ins. Co. of New York, 72 F. Supp. 752;

Lasater v. Hercules Powder Co., 73 F. Supp. 264;

Reid v. Day & Zimmerman, Inc., 73 F. Supp. 892;

Hornbeck v. Dain Mfg. Co., 7 W. H. Cases, p. 296;

Hart v. Aluminum Company of America, 73 F. Supp. 727.

Court decisions upholding what are said to be vested rights determine that upon the facts shown in each case, the right asserted was a vested right beyond the power of Congress to alter or abrogate. The term is not defined and no rule of general application is evolved. The resulting uncertainty as to what is and what is not a vested right makes this a very unsatisfactory test of the constitutionality of retroactive legislation. One writer on this subject, after noting the confusion in the cases, said:*

> "If the term 'vested' means anything at all, some of these laws certainly take away vested rights and yet such laws have been sustained. It is submitted that the distinction between vested and non-vested rights, like that between rights and remedies, or between jurisdictional and non-jurisdictional defects in legal proceedings, is of use primarily as a

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*Selected Essays on Constitutional Law, published under auspices of Association of American Law Schools, Vol. 2, pp. 279-280.

basis on which to classify decisions after they have already been reached on other grounds. Nor is it always applied consistently even to this use. . . . The distinction is of little use to determine the fate of a given law. If it is not a paradox to say so, a vested right is not necessarily immune to the power of retroactive legislation."

There are decisions both ways upon the question whether the wage and overtime obligation imposed upon employers by the Fair Labor Standards Act becomes a contract obligation under certain state statutes applicable to remedies. The prevailing view seems to be that although the liability under the Act is that of a contractual nature, it arises solely by virtue of the statute and is therefore to be classified as a liability created by statute.

Lorenzetti v. America Trust Co., 45 F. Supp. 128;

Smith v. Cudahy Packing Co., 73 F. Supp. 141;

Abram v. San Joaquin Cotton Oil Co., 45 F. Supp. 969;

McDuffie v. Hayes Freight Lines, Inc., 71 F. Supp. 755;

Drenne v. Mutual Life Ins. Co., 42 N.Y. Supp. (2d) 259;

Walsh v. 515 Madison Avenue Corp., 42 N.Y. Supp. (2d) 262, aff'd 293 N.Y. 826, 59 N.E. (2d) 183;

Asselta v. 149 Madison Avenue Corp., 65 F. Supp. 385, aff'd 156 F. (2d) 139, cert. den. 329 U.S. 764;

Cannon v. Miller, 22 Wash. (2d) 227, 155 P. (2d) 500.

The cases taking the opposite view, including two cited by appellant,* hold that wage and overtime claims under the Act are rights "arising upon contract", within the meaning of limitation and probate statutes. These cases do not determine that wage and overtime claims under the Act are vested rights. At most, they hold that the claims are not tort claims but are within the category of contract claims under the provisions of attachment and probate statutes, notwithstanding the fact that they were created by an Act of Congress.

Similarly the characterization of the statutory overtime wages as compensation and not a penalty, in *Overnight Motor Transportation Co. v. Missel,* 316 U.S. 572, 583, does not reach the question here involved. The Court held in the *Overnight* case that the damages collectible for failure to pay the statutory minimum wages were compensation to the em-

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*Northwestern Yeast Co. v. Broutin, 133 F. (2d) 628;
Hays v. Bank of America, 162 P. (2d) 679.

ployee and not a penalty or punishment by the Government. The statutory provision was characterized as remedial and not penal, but the remedy prescribed — the additional compensation to the employee — is statutory in its origin, and there is nothing in the decision to suggest that it can be classified as anything but a statutory remedy.

In the later case of *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, the Court made it quite clear that the overtime and damage right created by the Fair Labor Standards Act is a statutory and not a contractual right. Characterizing it as a statutory right specifically, the Court said that it was a right conferred on a private party but affecting the public interest; and the Court held that employees could not waive or compromise their claims for what was due them under the Act. The Act is available to them because they are employees. But the rights granted are not contract rights subject to their control; they are statutory rights, enforcible only as authorized and directed by the statute.

Appellant's chief support for its "vested right" contention is *Pacific Mail Steamship Co. v. Joliffe*, 69 U.S. 450. In its discussion of the questions involved in that case, the Court said that the State of California could

not invalidate rights of action which had accrued under an earlier statute imposing liability for pilots' fees on shipowners under certain circumstances. This liability was said to be quasi-contractual and the accrued right of action was characterized as a "vested" right. But this was not the question that controlled the disposition of the case. The Court examined the later California enactment and held that the legislature did not intend to impair or affect rights which had accrued under the earlier statute.

The *Joliffe* case was decided in 1865 by a divided court. Since that time no case has held that quasi-contractual rights — that is, rights added by statute to those created by obligations voluntarily assumed — have the same legal status and become vested rights upon their accrual; nor has the Supreme Court in any later case so characterized them. On the contrary, the Court has many times held that rights created by statute fall with the repeal of the statute; and where that is the statutory intent, accrued rights also become unenforcible. This rule was applied in *Flanigan v. Sierra County*, 196 U.S. 553, where the Court specifically rejected the contention that the right created by the earlier statute was contractual in nature and that rights which had accrued under it had therefore become vested. The Court said (196 U.S. 560):

"The general rule is that powers derived wholly from a statute are extinguished by its repeal. Sutherland on Statutory Construction, sec. 165. And it follows that no proceeding can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act. 9 Bacon's Abridgement, 226."

Appellant's claims, according to the findings of Congress (in Section 1 of the Act under consideration) are based upon "wholly unexpected liabilities" under which employees would receive "windfall payments . . . for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay." Appellee Neils Company's answer pleads that no work or service was required of or accepted from its employees during the travel time involved; the employment excluded the travel time from the work period.

The rights asserted by appellant were derived from the Fair Labor Standards Act as interpreted by the Supreme Court. They were not vested rights beyond the power of Congress to alter or repeal.

II.

Accrued contract rights may be altered or made unenforcible by federal legislation when in conflict with a national policy determined upon by Congress in the execution of its powers under the Constitution.

Appellant's argument that Congress lacks power in any circumstances to abrogate vested rights pointedly ignores the Gold Clause case* and other decisions of the Supreme Court upholding this power when exercised as a necessary incident to changes in national policy, in the regulation of interstate commerce, or in any other field placed in the control of Congress by the Constitution. Nearly all of the recent cases which have upheld Section 2 of the Portal-to-Portal Act (referred to earlier in this brief, ante p. 3) invoke and apply the rule of these decisions of the Supreme Court. Appellant's brief makes no attempt to explain why they are not controlling here.

In the Gold Clause case, the Court sustained the power of Congress to make unenforcible contract obligations to pay indebtedness in gold coin. Other instances of legislation which was sustained regardless of the fact that accrued contract rights were impaired are the anti-pass law provisions of the Interstate Com-

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*Norman v. Baltimore & Ohio R. R. Co., 294 U. S. 240.

merce Act (*Louisville & Nashville R. R. Co. v. Mottley*, 219 U.S. 467), the Employers' Liability Act of 1908 (*Philadelphia, Baltimore & Washington R. R. Co. v. Schubert*, 224 U.S. 603) and the Railroad Reorganization Amendments to the Bankruptcy Act (*Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U.S. 648). The anti-pass law nullified contracts providing for free railroad transportation for extended periods, often for life, in consideration of the release of personal injury or other claims. Similarly the Employers' Liability Act made unenforcible contracts under which acceptance of benefits provided by a relief plan operated as a release of damage claims. Section 77 of the Bankruptcy Act authorized changes in the contract rights of security holders pursuant to a reorganization plan accepted by a specified majority of each class of security holders.

In the decision of the Gold Clause case, the Court restated the reasons controlling its decision in the *Schubert* case (involving the Employers' Liability Act) as follows (294 U.S. 310):

> "The power of Congress, in regulating interstate commerce, was not fettered by the necessity of maintaining existing arrangements and stipulations

> which would conflict with the execution of its policy. . . . To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place to this extent the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of the Congress so much of the field as they might choose by 'prophetic discernment' to bring within the range of their agreements. The Constitution recognizes no such limitation."

The power of Congress to impair or destroy accrued contract rights found to be in conflict with a necessary change in national policy was specifically upheld in the Railroad Reorganization case, where the Court said (294 U.S. 680):

> "Speaking generally, it may be said that Congress, while without power to impair the obligations of contracts by laws acting directly and independently to that end, undeniably, has authority to pass legislation pertinent to any of the powers conferred by the Constitution however it may operate collaterally or incidentally to impair or destroy the obligation of private contracts."

In the three cases in other Circuits which have upheld the Act under review here, the power of Congress to abrogate contract rights in the circumstances shown was not doubted. *Seese v. Bethlehem Steel Co.*, 168 F. (2d) 58; *Battaglia v. General Motors*

Corp., 8 W.H. Cases, p. 108; *Fisch v. General Motors Corp.*, 15 Labor Cases, 74,129. In the *Seese* case the Court said (168 F. (2d) 62):

> "The Portal-to-Portal Act of May 14, 1947, like the Fair Labor Standards Act which it modified and amended, was an exercise by Congress of the power to regulate interstate and foreign commerce; and it is well settled that the exercise of such power is not invalidated even by the fact that its effect is to destroy rights under valid existing contracts. Such was the holding in Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136, where the court pointed out that private contracts as well as state legislation must yield in such case to the superior power of Congress. Such was the holding in Louisville & N. R. Co. v. Mottley, 219 U.S. 467, 31 S. Ct. 265, 55 L. Ed. 297, 34 L.R.A., N.S., 671, where an act of Congress was held to strike down a contract made in settlement of a personal injury case. And such was the holding in the case of Norman v. Baltimore & O. R. Co., 294 U.S. 240, 55 S. Ct. 407, 79 L. Ed. 885, 95 A.L.R. 1352, where congress in the exercise of the power to coin money and regulate its value struck down the 'gold clauses' of private contracts."

Similarly, in the *Battaglia* case, the Court said (8 W. H. Cases, p. 112):

> "The Portal-to-Portal Act, like the Fair Labor Standards Act, was passed as an exercise of the

> power to regulate commerce from time to time as conditions may require. The Congressional findings, made after investigations which disclosed amply supporting facts, show fully why the enactment of the Portal-to-Portal Act was necessary to avoid great injury to interstate commerce. In the Act Congress saw fit to change the Fair Labor Standards Act, which might be said previously to have made the appellants' contracts of employment include the right to compensation for portal to portal activities, by doing away with so much of those contracts in that respect as that statute had added to them. This did not deprive the appellants of any Constitutional right. If the contractual arrangements of these private parties were subject to the Fair Labor Standards Act as it might be interpreted by the courts, or were modified to take into consideration decisions construing that statute, they were also subject to changes made in it by Congress in the exercise of its power to regulate commerce."

Statutory rights which have accrued and which are in the process of enforcement in pending litigation are of course no more sacred than contract rights. If such statutory rights can be classed as "vested" rights, and of course there is the gravest doubt of this in the case of the rights here involved, they must give way to what has been found necessary by Congress in the public interest. Impairment of existing rights is "a necessary effect of any considerable change in the

public laws." *Louisville & Nashville R. R. Co. v. Mottley*, 219 U.S. 467, 485.

It can hardly be denied that the Portal-to-Portal Act effected a change in the national policy in a matter of great public concern. Enforcement of the overtime provisions of the Fair Labor Standards Act, as interpreted by the Supreme Court, threatened serious consequences to the economy of the country, and a change in the policy attributed to that statute was imperative.

It was not enough to change the rule for the future. Indeed, by far the greater threat to industry and to the Public Treasury as well lay in the enforcement of accrued claims upon which suit had been brought following the Supreme Court's decisions in the mine cases and in the Mt. Clemens Pottery case. In this situation it became necessary to declare that such liabilities had not been anticipated in the enactment of the Fair Labor Standards Act and to provide that they shall not be enforcible.

The "Findings and Policy" stated in Part I of the Act concludes that a substantial burden had been imposed on commerce with a resulting "substantial obstruction to the free flow of goods in commerce." The

reasons given for this conclusion relate almost entirely to accrued liabilities which were "wholly unexpected" and which were "immense in amount and retroactive in operation." Evidence presented to the Congressional committees had pointed out that there had been no opportunity to anticipate or to avoid these accrued liabilities. Men had been employed the full forty hours in each week upon the assumption then prevailing that preliminary and postliminary activities were not generally part of the compensable work; hence all the time expended in these activities became unpaid overtime for which the statutory penalty could be exacted. Of this situation the findings (Section 1 of the Act) say:

> ". . . if said Act as so interpreted or claims arising under such interpretations were permitted to stand (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of

competitive conditions between employers and between industries; (4) employees would receive wind-fall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur."

These findings amply sustain the conclusion that the national interest required a change in existing laws as interpreted by the Supreme Court, and that in the

emergency which existed the change must include a prohibition against the enforcement of accrued "portal-to-portal" claims. There is a parallel to these findings and to the conclusion drawn from them in the recitals of the Joint Resolution of Congress with respect to the "gold clauses" of private contracts for the payment of money. The second of the two recitals has the following language (294 U.S. 291, note 2):

> "Whereas the existing emergency has disclosed that the provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount of money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, . . ."

The Supreme Court upheld the power of Congress to nullify "gold clause" obligations because such contract rights were subordinate to the constitutional authority of Congress over the currency of the United States. In the decision the Court noted that Congress similarly had power to abrogate contracts when that became necessary in the regulation of commerce between the states. The Court said (294 U.S. 308), quoting from *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 229-230:

"Commerce is the important subject of consideration, and anything which directly obstructs and thus regulates that commerce which is carried on among the states, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce."

It is clear, therefore, that there are no private rights, vested or otherwise, which are completely beyond the power of Congress to alter or even to nullify in the exercise of its broad constitutional authority over such subjects as interstate commerce.

CONCLUSION

The rights sought to be asserted here were not vested rights. They were rights to specific statutory remedies which could be withdrawn at any time by the power that created them. But if upon any theory these asserted rights can be classed as "vested" rights, Congress had power to abrogate them when it found them in conflict with a change in national policy deemed necessary in the regulation of interstate commerce.

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